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No. 88-714

In The

Supreme Court of the United States

October Term, 1988

JAMES E. O'NEIL, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,

Petitioner,

v.

BLACKSTONE VALLEY ELECTRIC COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

REPLY BRIEF

SHELDON WHITEHOUSE
Special Assistant Attorney General
Department of Attorney General
72 Pine Street
Providence, R.I. 02903
(401) 274-4400

Counsel of Record
Attorney for Petitioner
JAMES E. O'NEIL
Attorney General
State of Rhode Island and
Providence Plantations

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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TABLE OF CONTENTS

Page

I. Blackstone Valley Electric's claim that its customers did not pay Montaup's FERC overcharge is belied by the undisputed underlying facts... 1

II. Blackstone Valley Electric's argument unfairly shifts the "bright line" required by this Court to separate state from federal utility regulation depending on whether federal charges or federal credits are at stake. 3

TABLE OF AUTHORITIES

Page

Federal Power Commission v. Southern California Edison Company, 376 U.S. 205 (1964) 3

Eastern Edison Co. v. Department of Public Utilities, 388 Mass 292, 446 N.E.2d 684 (1983) 3, 5

I. Blackstone Valley Electric's claim that its customers did not pay Montaup's FERC overcharge is belied by the undisputed underlying facts.

Blackstone Valley Electric Company has peppered its brief with the claim that "only a portion of [the refund] was collected from ratepayers." Blackstone Valley Electric Brief in Opposition (hereinafter "BVE brief") at p. 10; see also, pp. 6, 12. This claim muddies the issues, and the undisputed facts prove that it is not correct.

As the Attorney General's Statement of the Case relates, during the period of Montaup Electric's FERC overcharges, Blackstone Valley Electric was experiencing (at least on a net basis) local undercollections that resulted from the operation of its state-level Purchased Power Cost Adjustment clause ("PPCA clause"). Attorney General's brief ("AG brief"), pp. 2-4, 10. The question how the FERC overcharge and the state-level undercollection are related is resolved by BVE's own witnesses.

The company's testimony showed that the local PPCA miscalculations and the resulting state-jurisdictional losses would have happened *with or without* the FERC overcharge:

> Q: . . . If during the period November 5th of 1981 to December 31 of 1986, the M-7 related rates . . . had been guessed just right by Montaup so there was no refund requirement, would there still have been a PPCA undercollection during that period?
>
> THE WITNESS: Yes.

PUC Docket No. 1856, Tr. 9/3/87 p. 51. When the same issue was raised in a prior proceeding involving a $540,000 undercollection, the BVE witness' testimony was the same:

Q: Supposing that Montaup's interim rate had been exactly correct?

THE WITNESS: Then there would have been no need for a refund from Montaup.

Q: And then the amount of 540,000 then would never have been recovered.

THE WITNESS: That is right. It would have been a loss to Blackstone.

PUC Docket No. 1792, Tr. 5/28/86 p. 36. The PPCA undercollections were not only not caused by the FERC overcharge, they were actually (as well as jurisdictionally) independent. In fact, even the Rhode Island court concluded that the PPCA clause undercollections would have occurred and, but for the FERC refund, "would probably have been lost to the Company for all time." *Blackstone Valley Electric Co. v. P.U.C., supra,* 543 A.2d at 255.

BVE's testimony and the decision below prove that BVE collected the Montaup FERC overcharge from its customers on top of a base of independent local undercollections. These undisputed facts contradict the company's argumentative conclusion that "only a portion of [the refund] was collected from ratepayers," *supra*. The superficial appeal of the company's argument that it didn't collect the overcharge because of the undercollection, and therefore should not have to refund the overcharge, is consequently destroyed.

II. Blackstone Valley Electric's argument unfairly shifts the "bright line" required by this Court to separate state from federal utility regulation depending on whether federal charges or federal credits are at stake.

Blackstone Valley Electric's argument in opposition demonstrates the one-sided approach to federal preemption criticized by the Attorney General. AG brief pp. 14-17, 23-24. This Court has required a "bright line" to be drawn between federal and state regulation. *Federal Power Commission v. Southern California Edison Company*, 376 U.S. 205, 215-216 (1964). Blackstone Valley Electric draws the bright line between federal and state jurisdiction where the "price adjustment affect[s] the retail price of electricity between Blackstone and its customers and [is] therefore beyond the jurisdiction of the FERC." BVE brief, p. 5.

At the same time, however, BVE cites the case of *Eastern Edison Co. v. Department of Public Utilities*, 388 Mass 292, 446 N.E.2d 684 (1983), as holding that "a regulatory agency's attempt to prevent a retail utility from passing on part of the cost of a FERC-approved wholesale power rate . . . 'interfered with the FERC's exclusive jurisdiction to set rates for electricity transmitted and sold at wholesale in interstate commerce.'"[1] BVE brief at p. 13, quoting *Eastern Edison*, 388 Mass at 297, 446 N.E.2d at 687-688. BVE further admits that,

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[1] The Attorney General's argument in this case can be summarized effectively by replacing the word "cost" with the word "refund" or "credit" in this quotation excerpted from the Company's brief. The arguments are parallel.

> As to the wholesale rate, the price at which Montaup sells power to Blackstone in interstate commerce, there can be no question that the FERC has exclusive jurisdiction. That interstate price would of course include any refunds to the wholesale purchaser ordered by the FERC.

BVE brief, p. 5. The company cannot have it both ways.

Blackstone Valley Electric does not explain why a FERC-approved credit may be interfered with at will by state officials, when a FERC-approved charge must be assessed against ratepayers so as not to interfere with federal jurisdiction. Surely, this court's "bright line" separating state from federal jurisdiction does not shift depending on whether federal charges or federal credits are at issue. This important federal question does not " 'border[] upon the frivolous.' " BVE brief, pp. 3, 14.

In this case, its affiliate's FERC overcharges have put BVE in a better position than it would have been in but for the FERC overcharges. BVE's proposal to use the excessive and illegal overcharges by its FERC-regulated affiliate to compensate for state-jurisdictional losses attributable to defects in local rates amounts to federal relief for the state-regulated utility. The Attorney General submits that the refund offset crosses the "bright line" between federal and state regulation, and that *Eastern*

Edison has correctly stated the level of deference due federal rate and refund determinations.

Respectfully submitted,

SHELDON WHITEHOUSE
Special Assistant Attorney General
Department of Attorney General
72 Pine Street
Providence, R.I. 02903
(401) 274-4400

Counsel of Record
Attorney for Petitioner
JAMES E. O'NEIL
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